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APR 1

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH

Plaintiff,

—VS.—

JEAN SINCLAIR,

Defendant.

FILED

APR 19 1963

Clerk, Supremo Court, Utah

Case No. 9948

In the matter of the contempt of LaRae Peterson

APPELLANT LaRAE PETERSON'S BRIEF

Appeal from a contempt citation rendered against LaRae Peterson by the Honorable Marcellas K. Snow, Judge of the Third District Court in and for Salt Lake County, State of Utah.

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IN THE SUPREME COURT OF THE
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Plaintiff,

—vs.—

JEAN SINCLAIR,

Defendant.

Case No. 9948

In the matter of the contempt of LaRae Peterson

APPELLANT LaRAE PETERSON'S BRIEF

Appeal from a contempt citation rendered against
LaRae Peterson by the Honorable Marcellas K. Snow,
Judge of the Third District Court in and for Salt Lake
County, State of Utah.

STATEMENT OF THE KIND OF CASE

This is a criminal contempt citation rendered by
the Honorable Marcellas K. Snow, Judge of Third Dis-
trict Court in and for Salt Lake County, State of Utah,

against LaRae Peterson for refusal to answer a certain question propounded by the prosecutor.

DISPOSITION IN LOWER COURT

The lower court found LaRae Peterson in contempt for the refusal to answer the question hereafter set out and sentenced said LaRae Peterson to serve five days in the County Jail and set bond appeal at \$100.00.

RELIEF SOUGHT ON APPEAL

LaRae Peterson seeks reversal of the Lower Court's finding of contempt.

STATEMENT OF THE CASE

Jean Sinclair, Defendant in the main action, was charged with murder in the First Degree. It was alleged that she killed one Donald Foster on January 4, 1962, in Salt Lake County, State of Utah. During the course of the trial LaRae Peterson was called as a state witness. The prosecution, after a lengthy direct-examination propounded the following questions:

Mr. Banks: "I believe at the close of the last session we had an unanswered question. Would the reporter please read the last question."

Reporter Reading: "Well, I'll put it this way then. Have you had any homosexual acts with Jean or she with you?" (R-1)

LaRae Peterson: "Well, I refuse to answer on the grounds that it would tend to incriminate and degrade me." (R-2)

The lower court ordered the witness to answer the question stating:

The Court: "Yes, Mrs. Peterson, the court feels that under these circumstances the way the question is asked and in connection with the legal ramifications involved, that this privilege is not claimable by you at this time under these circumstances. And therefore, the court orders you to answer the question." (R-2)

Counsel for Miss Peterson noted his acception. (R-2) The question was repeated and the witness still refused to answer the question. (R-2, 3)

After the case in main had been submitted to the jury for its deliberations the lower court found LaRae Peterson on criminal contempt and sentenced her to five days in jail. From said order, the witness takes this appeal.

POINTS ARGUED FOR REVERSAL

The Court erred in holding the witness for contempt for refusing to answer the question concerning homosexual acts with the defendant.

In analyzing the point on appeal, the Court's attention is called to the following statutory language:

United States Constitution, Fifth Amendment —

“ . . . nor shall be compelled to in any criminal case to be a witness against himself . . . ”

Utah Constitution, Article 1, Section 12 —

“ . . . The accused shall not be compelled to give evidence against himself . . . ”

Utah Code Annotated, (1953 as amended) 78-24-9:

“A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it is to the very fact in issue or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact if his previous conviction for a felony.”

Utah Code Annotated, (1953 as amended), 77-53-22:

“Every person who is guilty of sodomy or any other detestable and abominable crime against nature, committed with mankind or any with any animal with either the sexual organs or the mouth, is punishable by imprisonment in the State Prison not less than 3 years, nor more than 20 years.

The position of this appeal can be stated, in its most simple terms, in the following proposition, to wit: That the witness, LaRae Peterson, had the legal right to claim the privilege, as outlined in the above statutes, on the particular question propounded to her inquiring as her "homosexual acts" with the defendant on the ground that said question would fall within the meaning of the law cited in Utah Code Annotated, 77-53-22.

To have been required to answer the question would have had a tendency to subject the witness for the punishment of a felony, to wit: A violation of Section 76-53-22. Utah Code Annotated (1953 as amended).

Prior to 1923, the Utah Statute read as follows:

"Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal is punishable . . ." Comp. Law, Utah, 1917.

This statute was held to be declarative of the common law and consequently did not include any acts which were not deemed sodomy in common law. *State v. Johnson*, 44 Utah 18, 137 Pac 632 (1913). Copulation per os was held not included in common law crime of sodomy and thus not within the purview of the sodomy statute.

In discussing common law definition of the infamous crime against nature, court cites Wharton's Criminal Law (11th Ed.), Sec. 754 wherein the author notes that "under the present doctrine, modification of common law doctrine is largely due to the broadening of the terms by legislative enactments rather than by judicial construction. Many of these statutes designate the offense as 'crime against nature' or 'detestable and abominable crime against nature . . .' whether with man or beast." P. 633.

The Utah statute was amended in 1923 to read as it does presently. The amendment of this statute has significance in that the statute is no longer restricted to those acts deemed sodomy at common law. *State v. Peterson*, 81 Utah 340, 17 P. 2nd, 925, (1933), wherein a motion to quash the information was denied by this Court. The information stated the act of fellatio and cunnilingus and this Court, speaking through Justice Elias Day, stated:

"It is clear, however, by the language used by the legislature in the 1923 amendment that the law making power of this state desired to extend the acts which constitute the infamous crime against nature to include copulation in the mouth. Nor was it necessary for the legislature to specify the particular acts which should constitute the crime against nature. That crime being known to the common law, the courts may resort to that source for a definition of the crime and then give effect to the legislative provision that the crime against nature is none the less such a crime when accomplished with the mouth." (Court cites cases).

“Our statute relating to the crime against nature as amended in 1923 is not open to the construction that it includes only the crime of sodomy as known to the common law.” (P. 926)

This decision has support from other jurisdictions. In the case of *State v. Milne*, R. I. 187 A 2nd, 136, (1962) (appeal pending U.S. Supreme Court) the Court construed a statute similar to the one which is here involved and the Court stated:

“Authorities hold that where the crime against nature is made criminal by statute the legislature is to be given a broad and comprehensive construction so as to include within the prohibition thereof unnatural copulation in all its forms. In other words, the generality of the prohibition of statutes of this kind is significant of a legislative intent to bring within the thrust of such legislation all unnatural acts of copulation involving either man or beast and including sodomy.” (P. 138.)

Also, *Berryman v. State*, Okla. Crim., 283 P. 2nd, 558, (1955) wherein the Court stated:

“We emphasize again that our statute does not mention the word sodomy, but punishes the ‘abominable and detestable crime against nature’ which includes not only sodomy as defined by common law, but all unnatural sexual copulation.” (Appeal dismissed, 76 S. Ct. 141, 350 U.S. 878, 100 L. Ed.)

Murray v. State, 236 Ind. 688, 143 N.E. 2d 290, (1957) wherein court cites with approval from *Sanders v. State*, 216 Ind. 663, 25 N.E. 2nd 995, (1940) where court said:

“The statute in this State defines the crime as ‘the abominable and detestable crime against nature with mankind or beast.’ This Court has held in common with the Courts of other jurisdictions under similar statutes that the statutory definition includes both common law sodomy and acts of brutal character whereby degraded and perverted sexual desires are sought to be gratified contrary to nature.”

Further, the Court in *Connell v. State*, 215 Ind. 318, 19 N.E. 2nd, 267, (1939) stated that the crime may be committed between man and woman, as well as persons of the same sex, as “mankind” includes woman. Also, see, *LeFavor v. State*, 77 Okl., C.R. 383, 142 Pac. 2nd 132, (1943).

Thus, it would appear that under the present attitude of this court, which is in keeping with the better reasoned authorities in other jurisdiction, that the Utah Statute is not limited to the strict common law crime of Sodomy, but is extended to all unnatural sexual relations between persons of the same sex. *ExParte De Ford*, 14 Okl. C.R. 133, 168 P. 58 (1917). *State v. Whitmarsh*, 26 S.D. 426, 128 N.W. 580 (1910). *Herring v. State*, 119 Ga. 711, 46 S.E. 876, (1904). *Johnson v. State*, 380 P2d 289 (1963).

The question which the witness refused to answer dealt with "homosexual acts." The case law in defining this type of act is of no assistance. Nor is the statutory law. See Robert Veit Shersin, *Sex and the Statutory Law*, p. 7. This term is broad and may extend from the mere acts of affection to acts calculated to arouse the purient interest of the actors with the aim of sexual satisfaction.* Due regard to the sentiments of decent humanity prevents any description of the latter acts which would fall within realm and meaning of abominable and detestable acts against nature. Suffice it to say that if the judge can say that the answer may tend to convict the witness and on that account refuses to answer, and the court can imagine any state of facts under which the answer might lead to such result, the witness may insist on the protection of the law and refuse to answer. (In *Re Tappen*, 9 How. Proc. 395 (.....)).

Concededly, that while the proposition stated in the above case is not in the language found in the subsequent decisions, the writer states that it represents a realistic approach to the particular problem at hand.

The latter decisions on this point have altered the above rule by stating when it reasonably appears that the answer will have a tendency to expose the witness to penal liability or to any kind of punishment or to a criminal charge, the witness need not answer. (Greenleaf Ev., Sec. 451, Wharton's Crime Ev. (9th Ed.), p. 466).

The better reasoned rule is expressed in *Hoffman v. U. S.*, 341 U.S. 479, 91 L. Ed. 1118, 71 S. Ct. 814 (1951) wherein the Court stated that it need only be evident from the implications of the questions in the setting in which it is asked that a responsive answer to the question might be dangerous because injurious disclosure could result.

Although the Utah statute states that a witness "need not give an answer which will have a tendency to subject him to punishment for a felony," U.C.A. (1953) 78-24-5, our court held that this clause was general and gives protection to a witness against giving an answer in any event which will have a tendency to subject him to punishment for crime. See *In Re Sadleir* 97 Utah 291, 85 P2d 810 (1938) wherein the court stated:

"We think this is the sense in which the word 'felony' is used in this section, notwithstanding the fact the statutes divide crimes into two classes—felonies and misdemeanors (R-S.U. 1933, 103-1-12)." p. 812.

Thus, this court in deciding the question here on appeal is not restricted to the felonies, but also must consider as to whether an inquiry as to "homosexual acts" may have a tendency to subject the witness to the punishment of any crime. To this purpose, the court's attention is called to Salt Lake City Ordinance 32-1-17 wherein "indecent and immoral conduct" is punishable as a misdemeanor.

The appellant's position would clearly fall within the purview of the statutes above indicated. Homosexual acts would necessarily include acts wherein the erotic senses are aroused and satisfied, and where two women are concerned, any such acts would constitute unnatural copulation. Clearly, homosexual acts need not include that type of conduct, however, "homosexual experiences" did include those acts described in *State v. Larsen*, 83 S. C. 1307 377 P2d 1 (1959) rehearing denied April, 1959, involving two adult males performing fellatio on each other. This case further indicated that said act is within the prohibition despite the fact that no copulation was achieved. This case does appear to be illustrative of the type of act which would fall within the meaning of "homosexual act" and consequently subject the witness, at bar, to the punishment of a crime. The difference of the gender can be of no significance. A stronger case is found in *People v. Manigus*, 119 Cal. App. 2d 753, 260 P2d 137 (1953) where the court, without describing the "repulsive details" affirmed the conviction of an act, involving the defendant and another woman lying naked on a bed, of copulating mouth of one person with the sexual organ of another. Further the court's attention is called to Utah Code Annotated (1953) (as amended) 76-1-2 wherein the common law rule of strict construction on criminal statutes is rendered inapplicable and the statutes are to be construed according to the fair import of their terms with a view to effect the objects of the statute and promote justice.

The general rule that the privilege against self incrimination and consequent refusal to answer the question put to the witness is applicable in this instance. This privilege must be upheld where it appears from the question asked that a responsive answer or explanation of the claim of privilege involve a disclosure dangerous to the witness but the privilege is confined to real danger and does not extend to remote possibilities out of ordinary course of law. *Hoffman v. U.S.*, (supra). *Blau v. U.S.* 71 S. Ct. 223, 340 U.S. 159, 95 1 Ed 170 (1950).

The question propounded by the District Attorney as to "homosexual acts" cannot be considered as a question which is innocent on its face. *U. S. v. Rosen*, C.A. N.Y. 174 F 2d 187 (1949) cert denied 70 S. Ct. 87, 338, U.S. 851, 94 L. Ed. 521. *People v. Schultz*, 312 Ill. App. 220, 38 N.E. 2d 379, (1941) affirmed 380 Ill. 539, 44 N.E. 2d 601, nor need the witness prove a precise danger so long as his answer is likely or has a tendency to be dangerous to him. In *Re Friedman* C.D.C. N.Y. 104 F. Supp. 419 (1952).

The basic problem of the court is how properly to afford full protection to the witness and at the same time prevent simulated excuses. Thus, if it appears that reasonable grounds exist for the witness to apprehend danger, or the inquire is found to be pregnant with danger, great latitude must be afforded the witness in determining what questions may be dangerous for him to answer,

or the effect of a particular question. *Kieweh v. U. S.*, (C.A. Minn., 204 F. 2nd 1, (1953). *Commonwealth Ex Rel, Esterline v. Esterline*, 181 Pa. Super, 532, 124 A 2nd 133 (1956) and any doubt must be resolved in favor of the witness. *U. S. v. DiCarlo*, D. C. Ohio, 102, F. Supp. 597, (1952) *U. S. v. Nesmith*, D. C. 121 F. Supp. 758, (1954). *Mumford v. Croft*, 8 Terry 464, 93 A 2d 506 (1952).

The caution to be exhibited by the trial court in these types of cases is clearly explainable through the fact that even if a question is at first sight an innocent one, it may require an answer which will constitute a link in the chain of evidence leading to the conviction of the witness. *Brunner v. U. S.*, C. A. Cal reversed on other grounds 72 S. Ct. 674, 343 U. S. 918, 96 1 Ed. 1331. *Com. v. Fisher*, 398 PA 239, 157 A 2nd 207 (1960), 98 C.J.S. Sec. 454. p. 303.

Chief Justice Marshall in *Burr's Trial, Robertson's Rep.* 1,243 in overruling the government contention that a witness can never refuse to answer any question unless that particular answer, standing by itself, would acknowledge the commission of the crime stated:

"This would be rendering the rule almost worthless, many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule, that no

witness be compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness by disclosing a single fact may complete the testimony against himself!"

Clearly the witness is not to be the sole determiner of the existence of the privilege and can not arbitrarily refuse to testify. There must in fact be a real danger that the answer would have a tendency to be incriminating and the trial court must determine if such real danger exists and if the witness swears under oath that the answer might tend to incriminate him, he should be allowed great latitude and the court should sustain his claim unless it is clear that the answer could have no tendency to incriminate. *Application of Lewitt*, 174 C.A. 2nd 535, 345 P 2nd 75 (1959). Further, in making this determination the trial court is not bound by the formal record, but should construe the questions addressed to the witness in the light of the setting in which the questions were asked and the court should be governed as much by the personal perceptions of the peculiarities of the case as by the facts actually in evidence. *Cohen v. Superior Ct. of Los Angeles County*, 172 C. A 2nd 61. 343 P 2nd 286. (1959).

Thus, under the law as above indicated, the witness, LaRae Peterson, had the legal right to claim the privilege against self-incrimination. However, if this court feels that the question put does not permit the witness to claim the privilege, then the question must then be

decided as to whether the question propounded "tends" to "degrade" the witness's character (Utah Code Annotated (amended in 1953) (Supra). This alternate qualified privilege must be afforded to the witness unless question is "to the very fact in issue or to a fact from which the fact in issue would be presumed." Utah Code Annotated, Supra.

In the main case, Miss Jean Sinclair was charged with murder in the first degree, not "homosexual acts" and consequently, the question put could not be considered as going to the very fact in issue. Further, the question could not be considered as going to a fact from which the fact in issue would be presumed. "Homosexual acts" could in no way be any fact from which the fact of murder could be presumed. Nor is it within the purport of the statute to say that "homosexual acts" is a fact from which the motive to kill may be presumed. Certainly, motive is fact which may be probative to establish the identity of the actor, however, any evidence of motive must be sufficiently connected with crime as to create the inference that the actor possessed the desire to kill at the time of killing. In the case in point, the question bore no relationship as to time or place as to make the inquiry relevant or pertinent to the establishment of any fact going to motive. The question was general and with no foundation as to time, it cannot be considered relevant and was made with no other purpose than to degrade the character of the witness.

The lower court clearly erred in finding the witness, LaRae Peterson, for contempt in her refusal to answer the question put to her as to her "homosexual acts." The appellant respectfully submits that this court reverse the lower court's finding.

Respectfully submitted,

JIMI MITSUNAGA

MITSUNAGA & ROSS